

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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December 14, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION,	:	DOCKET NO. PENN 2007-4
Petitioner,	:	A.C. No. 36-08766-098223
	:	
v.	:	
	:	
HAZLETON SHAFT CORPORATION,	:	Mine: Hazelton Shaft
Respondent.	:	

DECISION

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Hazleton Shaft Corporation, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a single violation of the Secretary's mandatory health and safety standards and seeks a penalty of \$60.00. The parties stipulated to the facts in the case, filed briefs and requested a decision on the stipulated record. For the reasons set forth below, I vacate the citation.

Background

The following are the stipulated facts in narrative format. The Hazleton Shaft is an underground, anthracite, coal mine, owned and operated by the Hazleton Shaft Corporation. It is located near Hazleton, Pennsylvania.

On August 10, 2006, an MSHA inspector was inspecting the preparation plant at the mine. He observed a Dewalt four inch grinder on a work bench on the second floor of the plant. The grinder was equipped with a pressure sensitive trigger requiring constant finger pressure to operate it. It also had a trigger lock that when engaged allowed the grinder to operate without constant finger pressure. The grinder was manufactured with both the pressure sensitive switch and the trigger lock, and both were functional. The grinder was not tagged-out of service or otherwise marked to indicate that it should not be used.

As a result of this observation, the inspector issued Citation No. 7009131, alleging a violation of section 77.402 of the Secretary's rules, 30 C.F.R. § 77.402.¹ The citation alleged that:

A Dewalt four inch hand grinder, located on the work bench outside the MCC room, on the second floor, was found to have a lockable trigger. The repairmen were picking up tools and finishing repairs. It was obvious the grinder had been used during the shift. The foreman and miners stated they did not know it was a violation to use a trigger lock.

The operator contested the citation.

Findings of Fact and Conclusions of Law

It is the position of the Secretary that "by requiring that hand held power tools be operated through constant hand or finger pressure" section 77.402 prohibits trigger locking devices like the one in this case. (Sec. Br. at 2.) The Respondent asserts that the "regulation is silent on whether the tool can or cannot be equipped with a trigger lock." (Resp. Br. at 3.) I find that the operator did not violate the rule in this instance.

In applying this regulation in connection with the facts in this case, it is important to keep in mind that the grinder was not observed in use by the inspector. It was merely lying on a work bench as described. Consequently, this decision will decide only whether a hand-held power tool that is equipped with controls requiring constant hand or finger pressure to operate it and also equipped with a trigger lock, violates section 77.402. No opinion concerning whether the rule would be violated if the grinder had been observed in operation with the trigger lock engaged will be rendered.

Clearly, the grinder complies with the plain meaning of this rule. It is equipped with a trigger requiring constant hand or finger pressure to operate it. There is nothing in the rule to indicate that it cannot also be equipped with a trigger locking device. The rule is plain and unambiguous, and the Respondent has not violated it in this case.

Notwithstanding that the rule is plain and unambiguous, the Secretary suggests that there are Commission cases establishing that a trigger locking device, like the one on this grinder, is prohibited by the rule. There are several problems with this argument. The first problem is that all of the cases are decisions issued by Commission judges, which do not have any precedential value. 29 C.F.R. § 2700.69(d). The second, and more significant, problem is that it is not apparent from any of the cases that the argument was made that a hand-held power tool equipped

¹ Section 77.402 provides, in pertinent part, that: "Hand-held power tools shall be equipped with controls requiring constant hand or finger pressure to operate the tools"

with both a pressure sensitive trigger and a trigger lock complies with the rule. Certainly if such an argument was made, there is no discussion of it in any of the cases. *Justis Supply & Machine Shop*, 22 FMSHRC 544, 550-51 (Apr. 2000) (ALJ); *Faith Coal Co.*, 17 FMSHRC 1146, 1171-72 (Jul. 1995) (ALJ); *Mettiki Coal Corp.*, 4 FMSHRC 1635, 1642 (Sep. 1982) (ALJ); *Pittsburgh & Midway Mining Co.*, 2 FMSHRC 311, 317, 326 (Feb. 1980) (ALJ).

It is somewhat surprising that the Secretary is arguing that trigger locks are prohibited, even if not being used, in view of her statements when adopting a similar rule for metal and nonmetal mines. When section 77.402 was first adopted in 1971, there was no discussion of the rule at all. Mandatory Safety Standards, Surface Coal Mines and Surface Work Areas of Underground Coal Mines, 36 Fed. Reg. 9364 (May 22, 1971). However, when announcing the final rules for metal and nonmetal in 1988 there was considerable discussion. Like section 77.402, the new rule was entitled “Hand-held power tools” and provided that: “(a) Power drills, disc sanders, grinders and circular and chain saws, when used in the hand-held mode shall be operated with controls which require constant hand or finger pressure. (b) Circular saws and chain saws shall not be equipped with devices which lock-on the operating controls.” 30 C.F.R. § 56/57.14116. The wording is somewhat different than section 77.402, but the meaning is the same.

In explaining the new rule, MSHA stated the following:

Under the proposed rule, the standard would have prohibited the presence, as well as the use, of lock-on devices for each of these classes of power tools. . . .²

The final standard recognizes that many power drills, sanders, and grinders are manufactured with lock-on devices as a standard feature. . . . Although the lock-on devices need not be removed, the standard continues to prohibit their use when the tool is operated in the hand-held mode. . . .

Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines, 53 Fed. Reg. 32496, 32511 (Aug. 24, 1988).

The grinder in this case was manufactured with a trigger locking device. There is nothing in section 77.402 which prohibits a trigger locking device. The grinder was not in use, so this is not a case where it was being used with the trigger lock engaged. In its most recent pronouncement on this issue MSHA has stated that trigger locks need not be removed from

² The proposed rule stated: “Hand-held power drills, disc sanders, grinders, circular saws, and chain saws shall be equipped with operating controls requiring constant hand or finger pressure. Such tools shall not have any lock-on devices.” Safety Standards for Machinery and Equipment at Metal and Nonmetal Mines, 49 Fed. Reg. 8375, 8383 (March 6, 1984).

hand-held tools that are manufactured with them. There does not appear to be any reason why hand-held power tools would be treated differently for metal and nonmetal mines than they are in surface coal mines and surface areas of underground coal mines. The grinder complies with the plain meaning of the rule. Accordingly, I conclude that the operator did not violate section 77.402.

Order

In view of the above, it is **ORDERED** that Citation No. 7009131 is **VACATED** and that this case is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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